3-21-1836

Jubal B. Hancock

24th CONGRESS, 1st Session. [Rep. No. 430.] HO. OF REPS.

JUBAL B. HANCOCK.

[To accompany bill H. R. No. 441.]

MARCH 21, 1836.

Mr. EVERETT, from the Committee on Indian Affairs, made the following

REPORT:

The Committee on Indian Affairs, to which was committed the petition of Jubal B. Hancock, submit the following report:

The petitioner claims two and a quarter sections of land, under the 14th section of the treaty of Dancing Rabbit creek, made with the Choctaw nation on the 27th September, 1830, and ratified 24th February, 1831.

That article is as follows: "Article xiv. Each Choctaw head of a family, being desirous to remain and become a citizen of the State, shall be permitted to do so by signifying his intention to the agent within six months from the ratification of this treaty, and he or she shall thereupon be entitled to a reservation of 640 acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one-half the quantity for each unmarried child which is living with him, over ten years of age, and a quarter section to such child as may be under ten years of age, to adjoin the location of the parent. If they reside upon said lands, intending to become citizens of the States, for five years after the ratification of this treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove, are not to be entitled to any portion of the Choctaw annuity."

The petitioner claims, as a "*Choctaw head of a family*," one section for himself, two half sections for his two unmarried children over ten years of age, then living with him, and a quarter section for a child under ten yeas of age.

The rights of the children depend on that of the father, and his right depends on the questions, 1. Whether he was, at the date of the treaty, a Choctaw head of a family; and 2. Whether within six months from the date of the treaty he gave notice to the agent of his intention to remain and become a citizen of the State. In relation to these questions the petitioner and the United States are the only parties whose rights can be taken into consideration; other questions may arise in the case in which the rights of the petitioner may conflict with those of third persons.

In relation to the first question, it appears from the testimony that the petitioner is a white native born citizen of the United States, and before becoming a member of the Choctaw nation was a resident of the State of

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Tennessee, when he married a woman of Choctaw descent, by whom he had children; that long before the treaty of 1830, he removed to and became a member of the Choctaw nation, and at the date of the treaty, was the head of a Choctaw family.

The question is, then, reduced to this: whether the head of a Choctaw family, on the facts stated, is a Choctaw head of a family within the fair construction of the treaty? It would be unworthy of the justice of the United States to avail itself of the technical sense of the word, or of its position in the construction of a sentence, contrary to the manifest intention of the other party to a treaty; and especially in a treaty with a nation with whom it treats on unequal terms. With the Indian nations, treaties are made in our language. They are, however, assented to through the medium of interpreters, of our own interpreters; and without imputing any intention of error, it would have been difficult to have explained to their understanding the difference, if any can be supposed to exist, between a Choctaw head of a family, and a head of a Choctaw family. They had no reason to make a distinction between members of their nation, whether members by blood or by adoption, nor between members by adoption whether previously citizens of the United States, aliens, or members of other tribes. Nor is there, in the opinion of the committee, any reason why the United States should make any such distinction.

The treaty was made with the Choctaw nation, and as a consequence, with every member of that nation. It was competent for that nation to determine who should be entitled to the privileges, who should be members of the nation; and every person who, at the date of the treaty, was in good faith, a member of the Choctaw nation, was a Choctaw within the meaning of the 14th article; and if the head of a family, was a Choctaw head of a family. Nor is it material whether the head, or the family or both, were Choctaws by blood or by adoption. In either case, as members of the nation, they were entitled to remove west or remain, and such as chose to remove were entitled to a share of the annuities, and such as remained, being heads of families, to reservations.

The absurdity of a distinction will be obvious from its consequences. It is well known that there were, among the Choctaws, as in other tribes, many intermarriages between white persons and native Indians, and the consequent half breeds; if none are Choctaws but those who are so by blood, then it would follow that the wife and children must remove because they were Choctaws, and the husband remain. The wife would not be entitled to a reservation, because she is not the head of the family; nor the husband, because he is not a Choctaw by blood.

The abstract question of natural allegiance and its consequences cannot be supposed to have been either thought of or understood by the Indians when they concluded the treaty. They well knew who in fact were members of their nation: and that all, without distinction, were subject to their laws, and entitled to equal protection and to equal privileges; and that all, whether adopted native born citizens of the United States, foreigners or Indians of other tribes, were equally, with the native Choctaws, subject or not, to the laws of the State in which the nation was located.

While members of the Indian nation, they were not regarded as citizens of the State. To entitle them to reservations each head of a family was to signify his intention "to remain," (the words which follow are but the consequence) "and become a citizen of the State."

Were there, however, doubts as to the construction of this article, the committee might refer to the provision in the xviii article, viz: "and further, it is agreed that in the construction of this treaty, wherever well founded doubt shall arise, it shall be construed most favorably towards the Choctaws."

The committee are then of opinion that the petitioner was entitled, under the treaty, to claim a section of land in his own right, as a Choctaw head of a family.

In relation to the petitioner in right of his children, the words of the treaty are "in like manner" (such head of a family) "shall be entitled to one half that quantity for each unmarried child which is living with him, over ten years of age; and a quarter section to such child as may be under ten years of age." It appears from the testimony that at the date of the treaty the petitioner had two children over ten years of age, and one under that age; that the eldest resided in his house, and the two younger elsewhere, but that they were under his care and control. He had at that time separated from his wife, who had returned to Tennessee. It does not appear that the younger children resided with her, or where they resided, or under what circumstances they were under the care and control of the petitioner.

All the relations between a parent and child are presumed to continue until the contrary is shown, and the children, wherever actually residing, will be considered as a part of the family of the parent so long as they are under his care and control; and in this sense the term "*residing with him,*" is used in the treaty. His reservations are given to him as a head of a family, and also in right of the members of his family, who it was to be expected would remain if he remained. The committee are therefore of opinion that the petitioner was entitled to claim two and a quarter sections in right of his children.

The committee do not consider the right affected by the fact proved, that the petitioner did not live with his wife at the date of the treaty, or that he has since married another woman. It was not necessary to constitute him the head of a family that he should have had a wife then living, or that his children should even have been legitimate; much less would his subsequent misconduct have impaired any right vested in him by the treaty.

In relation to the second question, whether the petitioner, within six months after the ratification of the treaty, (24th February, 1831) signified to the agent his intention to remain and become a citizen of the States All that was necessary to entitle him to the reservation was that he should signify such intention to the agent: that being done, the right vested in him could not be divested by any neglect of the agent. The treaty having provided that the notice should be given to the agent, the Government looked to the agent for the evidence of the fact, and by a regulation directed him to return a register of all such notices.

It appears by the testimony, that the petitioner did within six months, (viz. on the 12th August, 1831,) signify to the agent his intention to remain and become a citizen of the States, and claimed, and has ever since claimed, his right under the treaty; and that his name was entered by the agent, or the Register, but, by accident or mistake, was not returned to the War Department. He had thus perfected his right to the two and a quarter sections of land.

It further appears, that on the 1st January, 1832, the petitioner applied to the Secretary of War for a location of his reservations under the treaty; to which an answer was given, "that the name of J. B. Hancock is not upon the list of Choctaws entitled to reservations returned by the agent." The petitioner then furnished evidence to the Department of his having clearly given the notice required by the treaty, and of his being a Choctaw head of a family, &c.; and in consequence of this, on the 3d February, 1834, the following instructions were given to the locating agent, and of which notice on the same day was given to the petitioner:

DEPARTMENT OF WAR,
Office Indian Affairs, February 3, 1834.

SIR: Juba B. Hancock has transmitted to this office papers to establish his claim to reservations for himself and two children, under the 14th article of the treaty of September 27, 1830. He states, that he is a white man, married to a Choctaw woman, the mother of these children; that his son, William Mitchell, was twelve years old on the 1st day of September, 1830, and his daughter Mary Melinda, was ten years old on the 14th of February, 1830; that his name and theirs were registered by Col. Ward in August, 1831, but the leaf on which they were registered was lost. This statement is supported by the affidavit of Giles Thompson; and David Folsom and P. P. Pitchlynn certify, that the claimant was for many years prior to the treaty a citizen, and entitled to all the privileges of a citizen.

You are requested to inquire of Col. Ward, whether these circumstances are truly stated; and if they are, you will locate a section for the father, and a half section for each of the children, and apprize the Department of the result.

Very respectfully, &c.
ELBERT HERRING.

To Col. GEORGE W. MARTIN,
Columbus, Mississippi.

P. S. There is a third child, Caroline Delia, who is now about ten years of age, and of course entitled to a quarter section.

On the 29th September, 1834, the petitioner applied to the locating agent to locate his reservations on No. 13, 12, and remainder in No. 11; who answered that he had "not seen Colonel Ward, nor received any satisfactory evevidence of the fact of Hancock's registration from him, and that he did not feel himself authorized by his instructions to receive proof of the fact from any source except from Colonel Ward, the witness to whom he was referred in his instructions, and declined to make or authorize the location applied for without further instruction."

On the 16th October 1834, Colonel Ward gave a deposition giving the facts required by the instructions of the 3d February, which was forwarded immediately to the War Department.

The Department having thus recognised the right of the petitioner as a head of a Choctaw family, in his own right and in right of his children, and being furnished with the proof it required of his having duly signified his intention to remain under the fourteenth section, there appears then no reason why the location should not have been made by order of the De-

partment, and according to the provisions of the treaty; on what lands other than on such as should include his improvement or a portion of it, was subject to the discretion of the Department, with the restriction of boundaries by sectional lines of survey.

During the time thus spent in procuring testimony, other Indian reservations were located which conflicted with the claim of the petitioner. His improvement was on the southeast quarter section of No. 13, township 19, range 3 west. Jerry Fulson, an Indian reservee, whose improvement was on the southwest quarter section, of said No. 13, located his reservation on said southeast quarter section of No. 13, covering the whole of the petitioner's improvement, and on the west half and on the west half of the northeast quarter section of said No. 13, and on the west half and on the west half of the southeast quarter section of said No. 13, and the residue on No. 11 and 14. Israel Fulson, whose improvement was on No. 18, township 19, range 2 west, and adjoining the improvement of the petitioner, located his improvement on No. 18 and 7, and on southeast half of the southeast quarter section one, on the south quarter of the northeast quarter section of said No. 12, and another Indian (whether a reservee or not does not appear) had an improvement on the west half of the northeast quarter of section No. 13, so that by these two locations all lands adjoining the improvement of the petitioner and his improvement itself were covered; and on portions of No. 12 and 36, in township 19, floats and pre-emption rights were claimed. In some cases the land was entered by the pre-emption claimants, the purchase money paid, and pre-emption certificates issued by the register of the land office.

Thus circumstanced, the petioner on the 21st October, 1834, procured the locating agent to locate and mark on the map his reservations on No. 1, and on the east half of the southeast quarter of the southwest quarter of section No. 2, and on the west half and northeast quarter of the northeast quarter of section No. 12, township 19, range 3 west; and on the south half of section No. 36, in township 20, range 3 west; and in consequence of this location the lands have been secured from sale. It appears by a certificate of the register, that the locating agent had, before that time, made a location, in some parts differing from the one above mentioned, not, however, including any part of his improvement, but when or by whose directions it was made does not appear.

None of the Indian locations of reservations, or pre-emption or float claims have been confirmed, and until confirmed, the Executive is at liberty to direct a re-location of the reservations of the Fulsons and of the petitioner, to be made in such manner as will give each his right according to the provisions of the treaty, and their locations might be so made as to give to each a portion of his improvement, and might be laid to each in an entire tract, unless the pre-emption claimants have, in the mean time, acquired rights superior to those of the reservees.

The rights of the reservees originated from the treaty, and accrued to them when they gave notice to remain and become citizens. His right to have his reservation located conformably to the treaty became perfect, and Congress could pass no law that could impair this right, nor have they passed a law of that character.

The act of 19th June, 1834, revives the act of 1830, and extends its benefits to settlers of 1833, &c. The act of 1830 contains a proviso, that no entry or sale of any lands shall be made under the provisions of that act, which shall have been reserved for the use of the United States. By the

treaty of 1830, the lands necessary to satisfy the reservation were reserved to the United States, to be by them appropriated for that purpose. They remained in the United States subject to this use; when the Choctaw head of a family gave notice of his intention to remain, the use becomes instantly vested to, at least so much of his improvements as would be contained in the least tract that could be bounded by sectional lines, and to the right to have the remainder located; when his location was made and approved, he was entitled to occupy it as long as he should choose; and when he should have resided on it five years, he was entitled to a grant in fee simple.

The right of the reservees is, therefore, prior and paramount to any claim or right that could be acquired under the act of 1834, and no right is vested in the pre-emption claimants that entitles them to interpose between the United States and the petitioner, on the question of location.

The petitioner asks a confirmation of his last location, on the ground that he supposes it to be wholly invalid, because it did not include his improvement, and that location cannot now be made that will include his improvement.

The committee are not satisfied of the correctness of either of the positions taken. The locations after made by the locating agent are subject to the determination of the Executive, when affirmed, and then only are they irrevocably made. Until confirmed they may be altered, in whole or in part, and it is yet competent for the President to direct a new location so as to include the improvement of the petitioner, and to confirm so much of his several locations, as shall make up the whole quantity to which he is entitled.

The treaty guarantees a section of land, to include his improvements; by the term section is not meant an entire section, but a quantity equal to that contained in a section or 640 acres, which is to be bounded by sectional lines, and sectional lines are not descriptive only of those lines which bound entire sections, but also of those which divide sections, and those divisions are into halves, quarters, eighths and sixteenths. It follows then, that it is not necessary that the location should be in one entire tract; wherever practicable, it would be laid in one entire tract. But this may be impossible. Such may be the situation of adjoining improvements that the reservation of every reservee could not be located in one tract, without taking the whole of the improvements of others; so if prior locations should surround a quarter section on which was the improvement of a reservee, he could take only that quarter section, unless permitted to locate the residue elsewhere.

In the case of the petitioner, his improvement was on the southeast quarter of section 13. To this he is entitled of right. The question as to where the residue shall be located, is open between him and the Executive, and without disturbing the locations of either of the Fulsons or other reservees, further than depriving Israel Fulson of the southeast quarter section of 13, and for which he would be entitled to an equal quantity elsewhere, the Executive may locate the residue of the petitioner's reservation on any other sections, not before located, in an entire or separate tracts, as convenience may require. This construction is necessary to the execution of the treaty, and it is not perceived that any injustice can flow from it.

As between the United States and the reservee, the whole question of location is open. The provision that the reservation shall include the

improvement is, in this treaty, solely for the benefit of the reservee. No provision is made that the United States should pay for improvements abandoned. It is competent then for the reservee, with the consent of the United States, to relinquish this privilege, and to take other lands in exchange, and it may be competent for Congress to give such assent. The committee, however, do not recommend a confirmation of his location, but that a re-location should be made, on the ground that it should be so made as to interfere with the claims of others, as little as possible.

The five years having expired, the petitioner if now entitled to a re-location is also entitled to a grant in fee. To this an objection is made on the ground that he did not reside on the reservation during the whole of the five years.

It appears by the testimony that his improvement was claimed by an Indian reservee under a location; that in January, 1835, he attempted to erect a house on a part of his localities, but was driven off by force by some of the pre-emption claimants and others; that in February or March, 1835, having resided on his improvement until that time, he left it, and has since resided at Livingston, about five miles distance, without any intention to abandon his claim or citizenship.

The issue of abandonment is between the petitioner and the United States. The petitioner gave notice to the agent according to the treaty; he has done every thing on his part to prove a location of his reservation; and that it was not done in due time and manner is wholly the fault of the agents of the United States. The embarrassments into which the petitioner has been thrown are consequences of that default, and of which the United States cannot, in justice, take any advantage. His leaving his improvement in 1835, was the effect of a supposed necessity; his improvement being taken by a prior location, and when he attempted to settle on his location he was driven off by force.

On a view then of the whole case the committee are of opinion that the petitioner is entitled to his reservation, notwithstanding the agent neglected to return his name to the War Department; and now to a grant in fee, notwithstanding that, under the circumstances stated, he removed from his improvement before the expiration of the five years, and report a bill accordingly for his relief. With a view to avoid, if possible, a conflict with existing claims, they have provided that on his relinquishment of his right to a location according to the treaty, he may locate it on any lands acquired by the treaty, not subject to prior locations or pre-emption claims.